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In the
Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY, *Petitioner,*
v.
UNITED STATES ARMY CORPS OF ENGINEERS, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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The National Association of Home Builders ("NAHB") respectfully files this brief as amicus curiae in support of Petitioner, Solid Waste Agency of Northern Cook County ("SWANCC").[1]

INTEREST OF AMICUS CURIAE

NAHB represents 200,000 builders, land planners, land developers, and industrial developers. With approximately 850 affiliated state and local associations in all fifty states, NAHB is the most influential trade association representing the nation's housing industry. Because NAHB members are involved in numerous projects throughout the country, NAHB has substantial experience with federal regulation of waters of the United States and can provide the Court with additional insight into the issue at bar.

The "migratory bird rule" challenged in this case restricts the development potential of vast areas of land, so this Court's resolution of the issue presented is of great significance to NAHB and its members. The U.S. Army Corps of Engineers (the "Corps") interprets the Clean Water Act ("CWA") to cover a broad range of waters – from the territorial seas and major rivers to intermittent streams and tiny ponds, with no minimum size requirements. The Corps construes "navigable waters" to include water bodies in the traditional sense as well as wetlands, which include areas that do not even appear wet on the surface. U.S. Army Corps of Engineers Wetland Delineation Manual 36 (1987) (area may qualify as a wetland if saturated within 12 inches of the surface). Consequently, the "isolated waters" which the migratory bird rule purports to bring within federal control isolated water bodies as well as isolated wetlands. These isolated waters are ubiquitous. For example, a 1995 study by the

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[1] No counsel for either party authored this brief in whole or in part. No person or entity other than NAHB has made a monetary contribution to the preparation or submission of this brief.

Corps of isolated wetlands less than one-half acre in size indicates that approximately 8.3 million such wetlands averaging one-fourth of an acre are scattered across 1,836,469 acres of the United States - enough land to affect a multitude of citizens and local governments. The migratory bird rule subjects these depressions to federal regulation simply because they are or could be used by birds. In the absence of the migratory bird rule, these eight million low spots would fall under the sole jurisdiction of state and local governments. Application of the migratory bird rule is therefore of great consequence to any person or organization owning property that includes isolated wetlands or other isolated waters.

For home builders, the consequences of federal regulation of isolated waters are all too concrete. The presence of a federally regulated isolated water on a development parcel leaves a landowner in a Catch-22 situation: avoid the regulated area and leave it in its natural state (and thereby give up the right to develop what might otherwise be developable land), or obtain authorization in some form from the Corps to impact all or part of the area. Either course entails costs to the developer, costs that impact housing affordability.[2] Indeed, nearly ten years ago the Advisory Commission on Regulatory Barriers to Affordable Housing found that "environmental protection legislation and associated regulations dealing with wetlands often unnecessarily raise the cost of housing." Advisory Comm'n on Regulatory Barriers to Affordable Housing, "Not In My Back Yard": Removing Barriers to Affordable Housing

[2] A recent study found that the average cost of preparing a Section 404 permit application is $271,596, which does not include the significant additional costs such as those associated with mitigation and the carrying costs of the land during a lengthy permitting process that takes an average of 405 days. *See* David Sunding and David Zilblerman, Analysis of The Army Corps of Engineers' NWP Replacement Permit Proposal (2000).

(1991). Nearly ten years later, the regulatory hurdles created by the Section 404 permitting program have only gotten higher, resulting in ever increasing costs of compliance for landowners.[3]

SUMMARY OF ARGUMENT

At its core, this case concerns the authority of the federal government to control the use of land because it happens to include an isolated wet spot. It involves the same legal issue that went unresolved in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n.8 (1985): Whether Congress gave the Corps the authority to regulate as "navigable waters" isolated waters that are clearly not navigable and that have no hydrological connection to waters that are navigable. The case further presents the issue of whether assertion of jurisdiction over such isolated waters, if sanctioned by the CWA, is constitutionally permissible under the Commerce Clause where the only purported link between the isolated waters and interstate commerce is the area's use by migratory birds.

CWA Section 404 grants the Corps and the U.S. Environmental Protection Agency ("EPA") authority to regulate the discharge of dredged or fill material into navigable waters. The Corps and EPA by regulation have

[3] In fact, the Corps has substantially revised its nationwide permit program to make it more difficult for builders to obtain federal authorization to impact isolated waters. *See* 65 Fed. Reg. 12,818 (2000). Nationwide permits are general permits that are intended to provide a streamlined approval process for projects that would have minimal impacts on waters of the United States. Such permits have historically been widely used by home builders. Among other things, the Corps has eliminated Nationwide Permit 26, which authorized impacts of up to three acres of isolated wetlands and certain other waters of the United States for a single project, and replaced it with a new nationwide permit (No. 39) which limits impacts to only one-half acre of waters of the United States, a reduction of 84 percent in the acreage limit.

asserted jurisdiction over isolated waters "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1999); 40 C.F.R. § 230.3(s). In the present case, the Corps determined that it had jurisdiction over isolated waters on the property in question because of the so-called "migratory bird rule." Under the migratory bird rule, an isolated water (*e.g.*, a wetland or small pond lacking a hydrological connection to interstate waters) that is completely unrelated to commerce is deemed to have a sufficient effect on interstate commerce to trigger federal jurisdiction if the water is or would be used as habitat by migratory birds that cross state lines. 51 Fed. Reg. 41,206, 41,217 (1986). The Corps denied SWANCC's permit to fill the 17.6 acres in question after asserting jurisdiction over the property based on its finding that migratory birds used the isolated waters at the proposed site.

The Seventh Circuit's rationale in upholding the Corps' assertion of jurisdiction cannot be reconciled with the limits of Congress' Commerce Clause authority recognized by the Court in *United States v. Lopez* ("*Lopez*"), 514 U.S. 549 (1995), and *United States v. Morrison* ("*Morrison*"), 120 S. Ct. 1740 (2000). The Seventh Circuit found that the filling of isolated waters in the aggregate has resulted in a loss of habitat for migratory birds and, thus, in a decline in some bird populations. The court concluded, based on little more than surmise, that this has in turn led to diminished opportunities for activities such as bird watching and hunting, resulting in a substantial impact on interstate commerce. However, given that filling of isolated waters is not itself an economic activity, the court's reliance on the impacts of filling of isolated waters in the aggregate flies in the face of this Court's recent decision in *Morrison*. Moreover, the rationale employed by the Seventh Circuit, if allowed to stand, would effectively allow the federal government to regulate all use of land and would thoroughly federalize a quintessential state function.

Indeed, the Corps' assertion of jurisdiction must be scrutinized with particular care because land use is an

area of traditional state concern. The Corps' position is that simply because migratory birds use the property SWANCC intended to develop, the Corps could - and did - prohibit SWANCC from using it. This intrusion on the prerogatives of local governments to regulate land use in the best interests of the community is antithetical to fundamental principles of federalism and violates the mandate of the Tenth Amendment.

In addition, the Seventh Circuit was incorrect in holding that, in authorizing the regulation of "navigable waters" under the CWA, Congress intended to regulate isolated waters that are not remotely navigable. While Congress indicated an intent that the term "navigable waters" be read broadly, Congress never indicated that the qualifier "navigable" should be ignored entirely, as the Seventh Circuit has done. In light of the serious constitutional issues raised by a broader reading of "navigable waters," the Court should read the intended scope of CWA jurisdiction to exclude isolated waters having no connection with waters that are in fact navigable.

ARGUMENT

I. THE CORPS' ASSERTION OF JURISDICTION IS CONTRARY TO THE COURT'S HOLDINGS IN *LOPEZ* AND *MORRISON*

The Corps' claimed authority to regulate isolated waters through the migratory bird rule extends far beyond the bounds of the Commerce Clause and is contrary to the principles articulated by this Court in *Lopez* and affirmed in *Morrison*. Like the Gun-Free School Zones Act in *Lopez*, and the Violence Against Women Act in *Morrison*, the migratory bird rule is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to regulate an instrumentality of or thing in interstate commerce. Therefore, it can only be sustained if it regulates activities that substantially affect interstate commerce. *See Lopez*, 514 U.S. at 555-58; *Morrison*, 120 S.

Ct. at 1749. The activities being regulated here do not meet that test.

In its recent decision in *Morrison*, the Court reaffirmed that *Lopez* was not an aberration but in fact "provides the proper framework for conducting the required analysis" in a case such as this. 120 S. Ct. at 1749. The *Morrison* Court then went on to review a number of considerations that were important to the decision in *Lopez* and that guided the Court in reviewing the assertion of federal authority in *Morrison*. A review of these factors demonstrates that the assertion of federal jurisdiction in this case is well beyond the constitutional bounds established by this Court.

A. CWA Section 404 is Not a Regulation of Economic Activity

The first consideration identified by the *Morrison* Court is whether the activity being regulated is economic in nature. *See* 120 S. Ct. at 1750. The *Morrison* Court affirmed that this factor is critical, stating that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." *Id.*

The Seventh Circuit failed to consider whether the activity at issue was economic in nature. Moreover, ignoring the principle articulated in *Lopez* that courts may look to the aggregate impact of a class of activities on interstate commerce only in limited circumstances, the Seventh Circuit assumed without analysis that it was appropriate to consider the aggregate impacts of filling isolated waters in general. Indeed, the Seventh Circuit made no attempt to determine whether the isolated waters that SWANCC proposed to fill substantially affect interstate commerce. Rather, the court found that although the effect of the destruction of migratory bird habitat is unobservable with respect to each isolated pond, the aggregate effect, *i.e.*, the resulting decrease in bird populations, "substantially affects" interstate

commerce. This, the Seventh Circuit reasoned, is all the Commerce Clause requires. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d. 845, 850 (7th Cir. 1999) ("*SWANCC*").

The Seventh Circuit's conclusion runs counter to *Lopez* and *Morrison*. These decisions make clear that regulation of intrastate economic activity is analyzed differently from the regulation of intrastate non-economic activity. In particular, the Court has indicated that the effects of individual activities may be aggregated to achieve the required substantial effect on interstate commerce only where the activities in question are economic or commercial in nature, or where the regulation in question is part of a larger regulation of economic activity. *See Lopez*, 514 U.S. at 561; *Morrison*, 120 S. Ct. at 1750. The migratory bird rule does not meet this test.

1. *Filling of Isolated Waters is Not an Inherently Economic Activity*

The activities in question cannot be characterized as "economic" under the Court's Commerce Clause jurisprudence. When the Court has upheld federal regulation of intrastate activity "substantially affecting" interstate commerce, the cases have always involved activities or markets that were in and of themselves economic in nature, such as agriculture, the shipment of goods, or employment. *See e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (employment); *Hodel v. Indiana*, 452 U.S. 314 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (loan sharking); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (employment), *overruled on other grounds by Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (barbecue restaurant); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (accommodations at inns and hotels); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944) (employment); *Wickard v. Filburn*, 317 U.S. 111 (1942) (regulation of interstate market in wheat); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) (commercial milk sales); *Gibbons v. Ogden*, 22 U.S. 1, 9

Wheat. 1 (1824) (commercial navigation). All of these activities are inherently economic in nature.

The discharge of dredged or fill material is not an economic activity in this sense. Many discharges of dredged or fill material are undertaken for decidedly non-commercial reasons. For example, discharges into isolated waters may be undertaken by homeowners seeking to put in a driveway or a tennis court, or by non-profit organizations building churches or hospitals. Discharges may also be undertaken by state or local governments seeking to build libraries or even by the federal government itself undertaking a wide variety of activities from building military facilities to expanding national parks or wildlife refuges. Other discharges may be incidental to economic activities. For example, many who fill wetlands seek commercial gain or must conduct commercial activity in order to fill and develop wetlands. However, the fact that the filling of isolated waters may in some cases be economically motivated does not render the act of filling such waters economic in nature for purposes of the Commerce Clause. In *Lopez*, the respondent's possession of the handgun at issue was economically motivated in that Lopez was ultimately supposed to receive payment for delivering the gun. *See United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993). The Court nevertheless found that the act of possessing the handgun was not itself an economic activity.

The conclusion that filling of isolated waters is not an inherently economic activity is further supported by the lack of any direct correlation between the activities being regulated and the impacts that assertedly serve as the link to interstate commerce. For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court upheld the enforcement of penalties against a farmer for violating agricultural production quotas by growing wheat for his own consumption.

In *Wickard*, both the regulated activity and the economic impact involved the same subject matter, namely wheat, which is an economic commodity. In the current case, however, the activity being regulated is not,

for example, trade in migratory birds but rather is the filling of isolated waters. Thus, in this case there is no commonality of subject matter between the nature of the activity being regulated (*i.e.*, filling of isolated waters) and the purported impact of the regulated activity on interstate commerce (*i.e.*, fewer dollars being spent by individuals watching or hunting migratory birds). If one considers the purpose for which the fill is undertaken, *i.e.*, construction of a landfill, the disconnect with the purported economic impact is even greater. This lack of commonality further demonstrates that the filling of isolated waters is not an economic activity. Therefore, because the Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," *Morrison*, 120 S. Ct. at 1751, the Court should find that the filling of isolated waters in this case may not be regulated by the federal government.

2. *Corps Jurisdiction Over Isolated Waters Through the Migratory Bird Rule Cannot Be Sustained as Part of a Larger Regulation of Economic Activity*

The Court has indicated that even intrastate, non-economic activity may be regulated under the Commerce Clause in some circumstances. When an intrastate activity which is not in and of itself "economic" is "an essential part of a larger regulation of economic activity," it may "be sustained under [Supreme Court] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561.

However, the prohibition on the development of a landfill site due to the presence of 17.6 acres of semi-aquatic property used by migratory birds cannot be sustained as "an essential part of a larger regulation of economic activity." Though wetlands are often filled to produce more economically viable areas, the Section 404 program cannot be characterized as a regulation of economic activity. The program regulates a wide variety of activities, including many undertaken by homeowners

or by government agencies in connection with the provision of recreational facilities, parks, and even wildlife refuges. Thus, the Section 404 program is not a regulation of a commercial market or a class of economic activities. Nor is the Clean Water Act generally a larger regulation of *economic* activity. Indeed, the purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," 33 U.S.C.A. § 1251(a) (1999), not to regulate markets or commercial activities.

Thus, because the regulation of isolated waters is not a regulation of economic activity and is not part of a larger regulation of economic activity, *Lopez* and *Morrison* do not permit the Corps to establish the requisite substantial effect on interstate commerce by aggregating the effects of impacts to all isolated waters. The Seventh Circuit's decision to the contrary therefore conflicts with *Lopez* and *Morrison*.

B. The Migratory Bird Rule Does Not Constitute a Jurisdictional Element that Would Ensure, through Case-by-Case Inquiry, that the Activity Being Regulated Affects Interstate Commerce

The second consideration identified in *Morrison* is whether the statute in question has a jurisdictional element that might limit the reach of the statute to activities that have the necessary connection with interstate commerce. Thus, even though it regulates non-economic, intrastate activity, the migratory bird rule could still fall within the bounds of Congress' Commerce Clause authority if it constituted or included an appropriate jurisdictional element requiring that the requisite interstate commerce connection be determined on a case-by-case basis. *See Lopez*, 514 U.S. at 561-62. Although the Corps regulation that the migratory bird rule purports to interpret contains a jurisdictional element, *see* 33 C.F.R. § 328.3(a)(3) (federal jurisdiction extends to waters if their use, degradation or destruction could affect interstate commerce), this jurisdictional

element cannot rescue the migratory bird rule from constitutional infirmity.

First, the test set forth in the migratory bird rule does not appropriately limit the universe of waters that are made subject to regulation because the rule fails to require that the Corps demonstrate that the use, degradation or destruction of an isolated water would substantially affect interstate commerce. Indeed, the jurisdictional element goes so far as to cover those areas with only a potential link to migratory bird use and therefore a potential link at best with interstate commerce. Thus, the Corps is not required by its regulations to demonstrate that the isolated water has been used in a way that would even begin to establish any connection with interstate commerce, much less a substantial connection.

Second, the migratory bird rule defeats the purpose of a jurisdictional element because it effectively eliminates the requirement that an impact on interstate commerce be demonstrated on a case-by-case basis. Because migratory birds are everywhere, the Corps easily meets the jurisdictional test in every case. Finally, unlike other jurisdictional elements that have been held sufficient by courts to sustain statutes against constitutional challenges, *see, e.g., United States v. Bass*, 404 U.S. 336 (1971), the jurisdictional element in this case is not found in the statute but in the regulations and therefore may be changed at the whim of the Corps. Thus, the jurisdictional element in the Corps' regulations cannot save the migratory bird rule.

C. Congress Made No Findings Regarding the Impact on Interstate Commerce of Migratory Bird Use of Isolated Waters

The third consideration identified by the Court in *Morrison* is the existence of legislative findings regarding the impacts of regulated activities on interstate commerce. The Supreme Court stated in *Lopez* that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has

on interstate commerce." 514 U.S. at 563. *See also Morrison*, 120 S. Ct. at 1751 (quoting *Lopez*). However, the existence of such findings may assist a court in evaluating Congress' judgment that the activity at issue substantially affects interstate commerce, even though no substantial effect is readily apparent. *See id.*

Like the Gun Free School Zones Act in *Lopez*, neither the CWA nor its legislative history contain any congressional findings regarding the impacts of filling of any waters, to say nothing of isolated waters as a class, on interstate commerce. Section 404 of the CWA and the definition of "navigable waters" originated in the Federal Water Pollution Control Act Amendments of 1972. Throughout hundreds of pages of legislative history associated with the passage of the Act, Congress never mentioned isolated waters, and it certainly gave no indication that it intended to regulate isolated waters as a class, despite the fact that the extension of federal jurisdiction to isolated waters implicates many millions of acres. There is no discussion of the economic impacts of isolated waters in the legislative history and certainly no hint that Congress thought that activities in isolated waters would affect populations of migratory birds.[4] Thus, the CWA and its legislative history are of no help to Respondent in attempting to establish the required substantial impact on interstate commerce.

D. The Link Between Filling Isolated Wetlands Visited by Migratory Birds and Interstate Commerce is Attenuated and Unsubstantiated

[4] This omission is not at all surprising since it was not until 1985 that the Corps and EPA, under prompting from a single Senator, conceived the notion of assertion of jurisdiction over isolated waters based on their use by migratory birds. *See* Memorandum from Francis S. Blake, General Counsel, U.S. Environmental Protection Agency to Richard E. Sanderson, Acting Assistant Administrator, U.S. Environmental Protection Agency, "Clean Water Act Jurisdiction Over Isolated Waters" (1985).

The fourth consideration identified as important by the *Morrison* Court arises from the fact that the Court's decision in *Lopez* was based in part on the attenuated nature of the link between the regulated activities and their effect on interstate commerce. *See Lopez*, 514 U.S. at 563-67; *Morrison*, 120 S. Ct. at 1751. In *Lopez*, the government argued that the possession of guns might lead to violent crime, which would affect the national economy through increased insurance costs and unwillingness of individuals to travel to areas perceived as unsafe. *See Lopez*, 514 U.S. at 563-64. The government also argued that the presence of guns in schools threatens the educational process, resulting in a less productive citizenry, which in turn would adversely affect the Nation's economic well-being. *See id.* at 564. Although the economic effects of crime on society may be great, this does not mean that possession of guns affects interstate commerce. Accordingly, the Court rejected the "costs of crime" argument because it would allow Congress to regulate all violent crime, as well as any activity that may lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, it rejected the "national productivity" argument because it would grant Congress authority to regulate any activity it found was related to the economic productivity of individual citizens. *See id.* Under these two theories, the Court would be "hard pressed" to imagine any activity that Congress would not be able to regulate. *See id.*

The Seventh Circuit's rationale in this case is, if anything, more problematic than the reasoning rejected in *Lopez* and *Morrison*. Relying on *Hoffman Homes, Inc. v. Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993) ("*Hoffman Homes*") and on statistics contained in a survey conducted by the U.S. Fish and Wildlife Service and the Bureau of the Census, the Seventh Circuit found that millions of people annually spend billion of dollars engaging in activities such as watching and hunting migratory birds. Relying solely on *Hoffman Homes*, the Court went on to find that the destruction of migratory bird habitat and an attendant decrease in some bird

populations substantially affects interstate commerce. This purported connection between isolated waters and interstate commerce is at least as tenuous as that in *Lopez* and *Morrison* and is also largely unsubstantiated.

1. *The Purported Impact on Interstate Commerce Relied on by the Seventh Circuit is Unsubstantiated*

As noted, the Seventh Circuit's sole authority for the proposition that filling isolated waters substantially affects interstate commerce is its prior decision in *Hoffman Homes*. However, *Hoffman Homes* is a very slender reed that cannot bear the weight of such a significant constitutional determination. First, the statement of the *Hoffman Homes* court regarding the impacts of the cumulative loss of wetlands related to *all* wetlands, not the loss of isolated waters. Even as to the larger class of all wetlands, the court in *Hoffman Homes* did not find that the loss of habitat substantially affected interstate commerce, as suggested by the court in *SWANCC*. Rather, the *Hoffman Homes* court was considering the very different issue of whether EPA had reasonably interpreted its own regulations when it asserted jurisdiction over an isolated wetland based on its potential use by migratory birds. *See id.* at 260.

Second, the *Hoffman Homes* decision does not in fact provide any foundation for the proposition that loss of isolated waters substantially affects interstate commerce in the form of bird-watching and hunting. As support for this proposition, the *Hoffman Homes* court merely cites a 1985 North American Waterfowl Management Plan.[5] *See id.* at 261. That document states without citation of authority that waterfowl "generate" a "direct expenditure" of several billion dollars a year. The document goes on to state that changes in the landscape induced by man have "affected the distribution and abundance of several species," resulting in increases in

[5] The court also cites two cases which in fact provide little or no support. *See Hoffman Homes*, 999 F.2d at 261.

some populations and decreases in others. Thus, *Hoffman Homes* provides scant support for the argument that loss of isolated waters substantially affects interstate commerce.

The flaws in the Seventh Circuit's argument do not end there. In fact, the Court's rationale strongly suggests that the purported impacts on interstate commerce are non-existent. The *Hoffman Homes* court and the Seventh Circuit below indicated that the filling of isolated waters and the decline of some bird populations will cause people to have a diminished opportunity to hunt and observe those birds. They did not assert that filling isolated waters will actually cause fewer people to travel to birdwatch or hunt. For example, assume that bird-watchers travel to a certain area to observe twenty different species of birds. It does not follow that if the area changes so that it only supports ten different species, bird-watchers will stop visiting that particular site all together. On the contrary, they presumably will continue to frequent that area to study the birds that remain and go elsewhere to observe other species. Moreover, while some bird species have seen population declines in the past thirty years, as many or more species have seen population increases. According to the U.S. Geological Survey's North American Breeding Bird Survey, over one-half of more than 421 bird species have shown an increase in population during approximately the last 30 years. One group of those 421 species represents wetland/open water birds species, nearly two-thirds of which have increased in numbers since 1966.[6]

Perhaps more importantly, the statistics cited by the Seventh Circuit show that more people, not fewer, are traveling interstate to engage in bird-related activities. For example, the Seventh Circuit noted that in 1996, 14.3 million people traveled across state lines specifically to

[6] *See* U.S. Geological Survey, North American Breeding Bird Survey (visited July 25, 2000) <http://www.mbr.nbs.govp/bbs/guild/group98.html>.

observe birds, citing the 1996 National Survey of Fishing, Hunting and Wildlife Associated Recreation. *See SWANCC*, 191 F.3d at 850. According to the 1985 version of the same study, bird-watchers accounted for 11 million interstate trips per year. *See* National Survey of Fishing, Hunting and Wildlife Associated Recreation, 45 (1988). Thus, the surveys reveal a 30 percent increase in the number of trips being taken by interstate travelers to observe birds over the period from 1985 to 1996, hardly a sign of diminished opportunities for bird-watching. Therefore, assuming that the Seventh Circuit is not incorrect in its assertion that the cumulative loss of wetlands has reduced some bird populations, it is clear that the Seventh Circuit has incorrectly assumed that a reduction in some migratory bird populations has resulted in diminished birdwatching opportunities. Statistics show that this simply is not the case. Thus, the Seventh Circuit's conclusion that the destruction of migratory bird habitat and the resulting decrease in the populations of birds "substantially affects" interstate commerce does not withstand scrutiny.

2. *The Seventh Circuit's Logic Has No Stopping Point*

Even if they were substantiated, the purported impacts on interstate commerce in this case are too attenuated to provide a basis for the assertion of federal power. The chain of inference is a lengthy one: filling isolated waters results in a loss of habitat for migratory birds; loss of habitat results in an overall decline in some populations of migratory bird species; a decline in some bird populations results in diminished opportunities for hunting or observing that particular species; significant numbers of individuals who wish to hunt or observe the particular species whose numbers have diminished will forgo bird-watching or hunting trips or otherwise modify their travel. This is exactly the sort of piling of inference upon inference that was rejected by the Court in *Lopez* and *Morrison*.

Moreover, like the arguments made in support of federal regulation in those cases, the rationale of the

Seventh Circuit must be rejected because it has no logical stopping point and would obliterate the distinction between what is national and what is truly local. Indeed, the Seventh Circuit's decision below would allow the Federal government to regulate the use of nearly every inch of land in the United States. First, given the Corps' expansive definition of wetlands and water bodies, the Corps would have authority to exercise jurisdiction over millions of acres containing isolated waters, without regard for their size or location.[7] The Corps' regulations state that it may assert jurisdiction over such isolated wetlands if the use, degradation, or destruction of those wetlands could affect interstate commerce. The Corps' regulations go on to specifically enumerate several categories of isolated waters that meet this test. Generally, the isolated waters identified in the Corps study are too small to attract interstate travelers for recreational purposes, to provide fish or shellfish for sale in interstate commerce, or to be used for industrial purposes in interstate commerce. *See* 33 C.F.R. §§ 328.3(a)(3)(i)-(iii). Thus, the migratory bird rule is the only route by which the federal government can assert jurisdiction over these areas.

This, however, matters little because the migratory bird rule is the only jurisdictional tool the Corps needs. As the Seventh Circuit itself noted, somewhere between

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[7] A 1995 Corps study of isolated wetlands measuring less than one-half acre documents the migratory bird rule's importance in establishing federal jurisdiction over tiny, remote areas. The Corps' study did not include data from Louisiana, Michigan, New Jersey, Ohio, Texas, Washington, or West Virginia. It did not include isolated wetlands measuring one-half acre or larger, and it excluded "other waters" (such as ponds) that are not wetlands. Even with these omissions, the Corps' study found that there are 8,309,502 discrete isolated depressional areas meeting the federal wetlands definition scattered across 1,836,469 acres of the American landscape. *See* U.S. Army Corps of Eng'rs, 1995 Wetlands Delineation Field Evaluation Forms (June 1995) ("1995 Corps Data Forms").

2.5 and 6 billion birds inhabit the United States, two-thirds of which migrate. *See SWANCC*, 191 F.3d at 850. Nothing can prevent these birds from traveling throughout the Western Hemisphere and eventually alighting on any land or water in the United States. *See, e.g., Hoffman Homes, Inc. v. Administrator*, 999 F.2d 256, 262 (7th Cir. 1993) (noting that "migratory birds can alight most anywhere" and citing testimony to that effect by a biologist with the U.S. Fish and Wildlife Service). In one study, for example, researchers marked birds in North Dakota and later recovered them in 46 states, ten Canadian provinces and territories, and 23 other countries.[8] In addition, the migratory bird rule does not even require actual "use" by birds; potential use is sufficient, and there is no minimum standard for kind or frequency of use, or a requirement that a water be used by a particular type of migratory bird such as waterfowl. Thus, the migratory bird rule in practice provides the basis for the Corps to assert jurisdiction over virtually all of the 8 million depressional areas identified in its study. Clearly, the impacts of Corps jurisdiction based on the migratory bird rule are widespread.

While the Seventh Circuit purported to impose limits on the Corps' jurisdiction by citing a definition of habitat ("the place where a plant or animal species naturally lives or grows[,]" Webster's Third New Int'l Dictionary 1017 (1993)), such a limitation is an empty gesture. As previously noted, two-thirds of the 2.5 to 6 billion birds in the United States migrate. Moreover, birds can and do live anywhere, including a wide variety of urban and suburban environments. Therefore, allowing the Corps to regulate the habitat of migratory birds gives the Corps carte blanche to regulate any isolated water it chooses, effectively giving the Corps land use control over millions of acres of property under the guise of regulating "navigable waters."

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[8] *See* U.S. Fish & Wildlife Serv., Wetlands of the United States: Current Status and Recent Trends 1 (1984).

Of course, under the Seventh Circuit's rationale, there is no need for Congress to require the Corps to end its regulation at the water's edge or at the boundary of some wetland. If the presence of avian habitat automatically confers federal jurisdiction, there is no corner of the Nation that would remain off-limits to the federal government, truly obliterating the distinction between what is national and what is local. *Lopez*, 514 U.S. at 567.

The Seventh Circuit's faulty logic is similar to that of the *Morrison* petitioners, which as the Court noted would lead to endless congressional regulation of crime, as long as the nationwide, aggregated impact of a crime has substantial effects on employment, production, transit, or consumption. *See* 120 S. Ct. at 1752-1753. Moreover, by permitting Congress to regulate gender-motivated violence, it surely would be able to regulate all violent crime, since violent crime in general would certainly have a broader economic impact than its subset, gender-motivated violence. *See id.* Similarly, petitioners' reasoning in that case would have allowed Congress to regulate, for example, family law since the aggregate economic effect of marriage, divorce, and childrearing is significant. *See id.*

Likewise, following the Seventh Circuit's logic in the present case would lead to federal regulation of the filling or dredging of every pit, pond, depression, ditch, pool, trough, puddle, pothole, rut, dip, trench, and channel. Moreover, it would open the door to general federal regulation of land use. The Commerce Clause cannot be read to allow Congress to pre-empt an area of regulation that, as discussed below, has traditionally been the province of state and local governments.

Thus, the rationale of the Seventh Circuit cannot be squared with *Lopez* and *Morrison*. The Seventh Circuit would allow a relatively trivial impact on commerce to serve as an excuse for broad general regulation of private activities, a result which this Court has cautioned against.

Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968).[9] The Corps' assertion of jurisdiction must be rejected.

II. THE ASSERTION OF FEDERAL JURISDICTION OVER ISOLATED WATERS MUST BE SCRUTINIZED CAREFULLY BECAUSE LAND USE IS AN AREA OF TRADITIONAL STATE CONCERN

The migratory bird rule warrants careful scrutiny by this Court because, in determining whether development may occur in particular areas, the federal government treads upon ground traditionally reserved to the States by the Tenth Amendment. See *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring) (intrusion on state sovereignty requires a "stronger connection" with commercial concerns central to the Commerce Clause, or the intrusion "contradicts the federal balance the Framers designed"). *See also Morrison*, 120 S. Ct. at 1754 (expressing concern that petitioner's logic would authorize federal regulation of areas of traditional state regulation such as family law). The use of real property is a traditional State concern. *See Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).[10] In particular, States are regarded as the proper governing

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[9] Regulation of isolated waters is not the regulation of a class of activities such as might authorize the assertion of federal authority despite the trivial nature of any impacts on commerce associated with particular isolated waters. *See Wirtz*, 392 U.S. at 192. As Respondent conceded more than a decade ago, there is no indication in the statute or the legislative history that Congress intended to regulate isolated waters as a class. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 50, *National Wildlife Fed'n v. Laubscher* (S.D. Tex. 1987) (No. G-86-37).

[10] In fact, the Court has previously noted that "regulation of land use is perhaps the quintessential state activity." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

body to enact and enforce property laws concerning land use planning. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (authority of state and local governments to engage in land-use planning has been sustained against constitutional challenge as long ago as the decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). *See also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (state land-use law applicable to federal land). Moreover, decisions regarding local land use "properly rest with the community that is ultimately – and intimately – affected." *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). Thus, zoning and other aspects of land use regulation "are particularly within the province of local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). *See also Evans v. Board of County Commissioners*, 994 F.2d 755, 761 (10th Cir. 1993) (land use policy is a feature of local government and an area in which the tenets of federalism are particularly strong).

According to the Corps, because the 17.6 acres at issue serve as a habitat for migratory birds, the Corps has authority to prohibit SWANCC from developing the property as a landfill, and in fact did so. As a result, the Corps has effectively overridden the plan promulgated by 23 municipalities to address a local issue as basic as where to dump their garbage, in the process disrupting local land-use plans and zoning decisions and diminishing local governments' ability to address an issue of vital concern to its citizens. This intrusion is antithetical to fundamental principles of federalism and violates the mandate of the Tenth Amendment. *See Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) ("'[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); *New State Ice Co. v. Liebmann*, 285 U.S. 262,

311 (1932) (Brandeis, J., dissenting) (as a "social laboratory," States have the ability to react to local problems in a manner best adapted to local needs). States must not be prohibited from "exercising their own judgment in an area to which States lay claim by right of history and expertise [through regulation of] an activity beyond the realm of commerce in the ordinary and usual sense of that term." *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

By utilizing the migratory bird rule to exercise jurisdiction over intrastate, isolated waters, the federal government has effectively preempted traditional State authority over the use of millions of acres of land.[11] In the absence of the migratory bird rule, these areas would be subject to the wetlands laws enacted by many States and over 5,000 local governments.[12] Unfortunately,

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[11] As an example of the broad reach of the federal program, consider the State of Georgia's approximately 240,000 isolated wetlands that are each less than one-half acre. *See* 1995 Corps Data Forms. The migratory bird rule provides the federal government with 240,000 opportunities to trump State and local authorities in their traditional role as regulators of land use.

[12] *See, e.g.*, Conn. Gen. Stat. §§ 22a-28 to -45a (2000); Fla. Stat. Ann. §§ 373.414 - .421 (2000); Me. Rev. Stat. Ann. tit. 38, §§ 480-A to -Z (2000); Mass. Gen. Laws Ann. ch. 131, §§ 40, 40A (2000); Mich. Comp. Laws §§ 324.30301 - .30323 (2000); Minn. Stat. § 103G.222 - .2373 (2000); N.H. Rev. Stat. Ann. §§ 482-A:1 - :27 (2000); N.J. Rev. Stat. §§ 13:9B-1 to -30 (2000); N.Y. Envtl. Conserv. Law §§ 24-0101 to -1305 (2000); Vt. Stat. Ann. tit. 10, § 1272 (2000). Many of these statutes provide for local regulation or management of isolated waters and wetlands. *See, e.g.*, Conn. Gen. Stat. § 22a-42 (2000); Me. Rev. Stat. Ann. tit. 38, § 480-F (2000); Minn. Stat. § 103G.2243 (2000); N.Y. Envtl. Conserv. Law § 24-0501 (2000). For examples of local ordinances or by-laws regulating isolated waters and wetlands, see Sacramento, Cal. General Plan CO-96 (1993); Broward County, Fla., Code §§ 27-331 to -350 (1993); *Lovequist v. Conservation Comm'n of Dennis*, 393 N.E.2d 858 (Mass. 1979); *Biggs v. Town of Sandwich*, 470 A.2d 928 (N.H. 1984); and Hearings on S. 1304 Before the Subcomm. On Clean Water, Fisheries and Wildlife

where property contains isolated waters as defined by the federal government, State and local governments cannot implement their land use regulations until the federal government approves the local development projects – a textbook violation of the basic principles of federalism.[13]

Moreover, the very structure of the CWA evidences a congressional respect for these federalism principles that the migratory bird rule undermines. When Congress enacted the CWA, it attempted to preserve the authority of the States, stating that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C.A. § 1251(b) (1999). Therefore, Congress elected not to regulate all sources of water pollution, leaving the control of runoff from agricultural and silvicultural operations to the states. Congress also

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of the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. (1993) (statement of National Association of State Departments of Agriculture) available in LEXIS, Legis Library, Cngtst File (noting that over 5,000 local governments have adopted wetland protection regulations).

[13] As Petitioners note in their brief, this federal veto authority over state and local land use decisions is of more than academic interest. Local development projects are not infrequently opposed by local citizens for a variety of reasons having little to do with the environment but everything to do with perceived impacts on property values and related concerns. This is the now familiar "NIMBY" syndrome. The concerns of such project opponents are properly dealt with by local land use authorities. Nevertheless, such opponents are often able to use the Section 404 permitting requirements to fight a project simply because of the Corps' *de facto* veto authority over local land use decisions. Thus, all too often the Corps becomes an active participant in local land use debates that are driven by NIMBYism rather than regard for the aquatic ecosystem.

excluded groundwater from the CWA's coverage to prevent federal interference with complex state jurisdictional rules. *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 73 (1971); 118 Cong. Rec. 10,699 (1972). In addition, Congress enacted Section 208 to encourage the States to develop waste treatment management plans that would cover pollution sources not regulated by federal law. *See* 33 U.S.C.A. § 1288 (1999). Congress clearly tried to strike a careful balance, asserting federal authority where necessary to protect strictly federal interests, while promoting a voluntary federal-state partnership in matters beyond the reach of the federal government, and preserving State authority elsewhere.

The migratory bird rule nullifies this balance, extending federal authority to more than eight million isolated depressions, most of which would be covered under State or local regulations. In the absence of a clear statement by Congress of its intent to change the federal/state balance, the Court should not countenance such a dramatic displacement of traditional state authority. *United States v. Bass*, 404 U.S. 346, 349 (1971). As shown below, no such evidence of congressional intent exists.

III. DUE TO GRAVE CONSTITUTIONAL CONCERNS REGARDING THE MIGRATORY BIRD RULE, THE CWA SHOULD BE READ NARROWLY TO EXCLUDE JURISDICTION OVER ISOLATED WATERS

According to the Supreme Court, when an Act's interpretation raises "serious constitutional concerns," the Court must independently inquire whether there is another, less objectionable interpretation that may be ascribed to the Act. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568, 577 (1988). *See also National Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (where expansive reading of statute would raise serious constitutional questions, the Court requires a clear expression of congressional intent

before concluding that the statute grants jurisdiction). Because the migratory bird rule raises serious constitutional concerns regarding the extent to which the Commerce Clause's limits may be stretched, the Court should read the CWA narrowly to exclude jurisdiction over isolated waters.

A. The Court Cannot Completely Ignore the Concept of Navigability

In enacting the CWA in 1972, Congress chose to assert jurisdiction over "navigable waters." 33 U.S.C. § 1311(a). Nothing in the plain language of the statute or its legislative history suggests that, in using this jurisdictional phrase, Congress used the word "navigable" as mere surplusage and intended it to have no particular import. In fact, while Congress defined "navigable waters" as "waters of the United States," Congress had a long history of using these or similar terms that demonstrates that in 1972 Congress understood all such terms to incorporate some notion of navigability.

For example, in 1899 Congress passed a Rivers and Harbors Appropriations Act (including what is sometimes known as the Refuse Act) which made it unlawful to construct any bridge, causeway, dam or dike over or in, *inter alia*, any navigable river or other "navigable water of the United States" without specific approvals. 33 U.S.C. § 401. At the same time, Congress prohibited the creation of any obstruction to the navigable capacity of any "waters of the United States" unless authorized by Congress, and prohibited the excavation or filling of, *inter alia*, the channel of any "navigable water of the United States" unless authorized by the Secretary of the Army. 33 U.S.C. § 403. As part of the same Act, Congress made it unlawful to discharge any refuse matter into any "navigable water of the United States" or to deposit any material on the bank of any "navigable water" where it might be washed into the navigable water. 33 U.S.C. § 407. *See also* Rivers and Harbors Act of 1894, § 5, 33 U.S.C. § 499 (authorizing

regulations for operation of drawbridges built across "navigable rivers or other waters of the United States"). There is no indication that Congress intended these various terms to be anything other than interchangeable. *See, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 484-87 (1960) (reading terms as being essentially coextensive). Moreover, there can be no dispute that Congress intended all of these terms to be tied to the concept of navigability.

Congress continued its interchangeable use of these terms over the ensuing decades. For example, in passing the Federal Power Act in 1920, Congress used the terms "navigable waters of the United States" and "navigable waters" interchangeably. *See* 16 U.S.C. § 817. *See also* Act of Sept. 15, 1922, c. 313, 42 Stat. 844, 33 U.S.C. § 472 (concerning marking of anchorage grounds for vessels in "waters of the United States"). As late as 1972, only three weeks before passing the CWA, Congress again made use of the term "navigable waters" in a context that makes clear that the term was based on notions of navigability. *See* 33 U.S.C. § 535i.

It was in the context of this long history that Congress invoked the phrase "navigable waters" in defining the scope of the CWA. In light of this history, it is evident that the term "waters of the United States" was not intended to convey a wholly different meaning, one without any connection to navigability. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (Congress is assumed to have intended legal term of art to have its established meeting).

The legislative history of the CWA does not suggest a different result. Rather, the legislative history indicates that, as the Court indicated in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), when Congress defined "navigable waters" as "waters of the United States" it merely renounced regulatory limits under other water pollution control statutes and began to regulate waters that would not be deemed "navigable" under that term's classic definition. *See id.* at 133 (quoting Sen. Conf. Rep. No. 92-1236, 144 (1972); 118 Cong. Rec.

H33,756-57 (1972) (statement of Rep. Dingell). Congress simply intended to define the term pursuant to then recent judicial opinions that "expanded that limited view of navigability . . . to include waterways which would be 'susceptible of being used . . . with reasonable improvement.'" 118 Cong. Rec. H33,756 (1972) (statement of Rep. Dingell) (quoting *United States v. Utah*, 283 U.S. 64, 72 (1931)). In other words, the text was designed to reference the broader definitions of "navigable waters" and "waters of the United States" established by this Court. However, such broader definitions do not encompass isolated waters without any connection to navigation.

Moreover, there is no suggestion in the legislative history of the 1972 Act that Congress had any intent to regulate waters that are not connected in any way to waters that are navigable in fact. There is simply no mention in the legislative history of isolated wetlands or other isolated waters such as ponds, dry washes, or ephemeral waters. Thus, the meaning of the statement in the House and Senate conference reports that the conferees intended to give "navigable waters" the broadest possible constitutional interpretation is clear. *See* S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972); H.R. Rep. No. 911, 92d Cong., 2d Sess, 131 (1972). Congress clearly intended that the CWA regulate waters capable of navigation by reasonable improvement. Had Congress' intent been otherwise, it would have said so expressly.[14]

Despite the evident intent of Congress, the Corps' definition renders "navigable" completely meaningless. Although the Court may determine, as it did in *Riverside Bayview*, that the CWA's definition of "navigable waters" indicates that the term "navigable" is of limited import, it

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[14] Congress certainly knew how to craft statutory language that would assert federal jurisdiction to the maximum extent allowed by the Commerce Clause. *See, e.g.*, 33 U.S.C. § 817 (waters "over which Congress has jurisdiction under its authority to regulate commerce").

should not completely ignore the concept of navigability. To drain the word "navigable" of any meaning at all would run counter both to history and to the cardinal principle of statutory construction that the Court must give effect, if possible, to every word of a statute. *Williams v. Taylor*, 120 S. Ct. 1495, 1519 (2000). Indeed, "navigable" must assume some significance because had Congress intended that the word have no meaning at all, it would have employed another term in its place.

In short, when Congress defined "navigable waters" as "the waters of the United States," it did not grant the Corps the authority to regulate water bodies in the broad and constitutionally suspect manner approved by the Seventh Circuit. *See generally United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (Because the Corps' regulation defining "navigable waters" includes intrastate waters that need have no connection whatsoever to navigable or interstate waters, it expands the term "waters of the United States" beyond permissible limits). Therefore, this Court should interpret the CWA in light of the constitutional hurdles that would arise by reading the Act so broadly that it allows the Corps, through the migratory bird rule, to assert jurisdiction over waters without a connection to interstate or navigable waters, or waters that do not otherwise substantially affect interstate commerce. *See id.* at 258.

B. The Fact that an Expansive Reading May Further the Goals of the CWA is Irrelevant

Respondents have argued that SWANCC's contention that the term "navigable waters" should be limited to waters that are navigable in fact, interstate, or closely related to navigable or interstate waters is adverse to the purpose of the CWA. *See* Brief for the Respondents in Opposition to Petition for A Writ of Certiorari, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, No. 99-1178. Implicit in this contention is that allowing the Corps broad authority to regulate isolated waters based on their possible use by

migratory birds furthers the CWA's objectives. However, the fact that a broad reading of a statute may further the statute's purpose is immaterial:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987). Moreover, the Court has noted that application of broad legislative purposes at the expense of specific provisions ignores the problems Congress must resolve and the dynamics of the process in which Congress must engage to resolve them. For example, although Congress may unanimously enact a piece of legislation, its members may differ drastically on the means by which that legislation will be implemented. Thus, the final statutory language may reflect hard-fought compromises. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). "[I]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 374.

Clearly, allowing the Seventh Circuit's expansive reading of the CWA simply because it might somehow further the purpose of the Act is inappropriate. Based on this Court's jurisprudence, the Court should interpret the CWA based on the Act's final statutory language and refuse to allow the Corps to engage in an unreasonable expansion of the CWA's terms.

CONCLUSION

For the foregoing reasons, the Court should reverse the Seventh Circuit's decision granting the Corps the authority to regulate isolated waters based on their use by migratory birds.

Respectfully submitted,

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